No. 628

In The
Supreme Court Of The United States

OCTOBER TERM, 1942

INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, AND ILLINOIS CENTRAL RAILWAY COMPANY, *Appellants*

vs.

COLUMBUS AND GREENVILLE RAILWAY COMPANY, *Appellee*

BRIEF FOR THE COLUMBUS AND GREENVILLE RAILWAY COMPANY, APPELLEE

No. 628

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INTERSTATE COMMERCE COMMISSION, J. M. KURN AND JOHN G. LONSDALE, TRUSTEES OF THE ST. LOUIS - SAN FRANCISCO RAILWAY COMPANY, ET AL, *Appellants*

v.

COLUMBUS AND GREENVILLE RAILWAY COMPANY, *Appellee*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

BRIEF ON BEHALF OF APPELLEE

This is an appeal from an unanimous decision and final decree for a permanent injunction of a statutory Three-Judge Court holding invalid the order of the Interstate Commerce Commission, in cause entitled *Cottonseed Allowances of Columbus and Greenville Railway Company*, 248 I. C. C. 441 (R. 66-72).

The appellee, the plaintiff below, brought suit under the "Urgent Deficiencies Act" of October 22, 1913; c. 32,

38 Stat. 220, in the Federal Court for the Northern District of Mississippi, Eastern Division, to set aside an order entered by the Interstate Commerce Commission holding that appellee's Freight Tariff No. 9-B, I.C.C. No. 81, was unlawful and in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act (R. 11). The appellant carriers that had intervened in the proceeding instituted by the Commission were made defendants in said suit. As a part of this brief we adopt the opinion of the lower court (R. 66-70), *Columbus and Greenville Railway Company vs. U. S., et al*, 46 F, Supp. 204.

For an understanding of the facts, reference should be made to certain provisions of each of the appellants' "cut-back" tariffs placed in evidence.

The Illinois Central tariff contains this language:

> "Rule 30 (b) The rates shown in Section No. 2 must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill station proper, in effect on date of shipment from point of origin and freight charges will be collected by the agent at such rates upon delivery." (R. 31, 47).

The Frisco tariff, ITEM 5 (b) provides:

> "The rates shown herein must not be used in waybilling shipments. All shipments must be waybilled at full local or joint rates applicable to manufacturing or mill point proper, in effect on the date of shipment from point of origin, and freight charges will be collected by the agent at such rates upon delivery." (R. 19).

Neither of these tariffs shows the concurrence of any other carrier.

Item 5 of the Columbus and Greenville's tariff I.C.C. No. 81, which is in issue, is in substantially the same language. (R. 14 (c)). Also the provisions with reference

to the application of the appellant carriers' cut-back tariffs are the same as those of appellee's tariff as they relate to the procedure by which the shipper of cottonseed products from the mill point obtains a refund upon the surrender of inbound freight bills along with evidence of shipments of products of cottonseed outbound.

The only difference between appellee's and appellants' tariffs is that the appellee does not discriminate between shippers of rail cottonseed products from the mill point, whereas appellant carriers only make a refund to those shippers of products who transport the seed to the mill point over their lines. This privilege incorporated in appellee's tariff I.C.C. 81 equalizes the net charge to the shipper for the total haul of the cottonseed and products thereof with charges resulting from the application of the tariffs of appellants at competitive points. "The refunds, or cut-back, are exactly the same in amount as those of the other carriers serving the mill point." (R. 8-9).

As found by the Commission: "The purpose of making the refund is to enable it (appellee) to compete for traffic that might otherwise move outbound over the line that originated the seed." (R. 9).

The Commission also found this: "The originating lines hold themselves out to cut-back their local inbound rates on the seed which they originate *in order to induce the shipper to move the outbound products over their lines.*" (Italics ours.) (R. 9).

The Commission further found that: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee's) tariff as the inbound shipments move from origin points to the mills at the local rates under separate bills of lading." (R. 9-10).

The Commission, in its majority report, (R. 11), without stating any reason for its holding, found that to the extent appellee's tariff provides for a refund, or cut-back,

to the shipper on traffic originated and hauled to the mill points by other rail carriers, it is unlawful and in violation of section 1 (6), section 6 (4), and section 6 (7) of the Interstate Commerce Act.

ISSUE

The issue presented is whether the transit privilege, or practice, in appellee's tariff I. C. C. No. 81 violates the provisions of the Interstate Commerce Act as found by the Commission. In other words, is the tariff, per se, unlawful?

ARGUMENT

When cottonseed moves from origin to common mill point over the lines of appellant carriers, the rate as filed and published in their local tariffs is assessed and collected, and all obligations between the shipper, carrier and consignee as to that traffic are ended or discharged. Only after the seed have been manufactured into various products, as oil, meal, cake, linters, etc., and subsequently moved outbound, does the cut-back tariff of appellee or appellants come into operation. The seed at the mill point are "free seed"; so are the products manufactured from them. On the foregoing there is no dispute. Unless the appellee, by means of its tariff I.C.C. No. 81, ordered canceled by the Commission, is permitted to offer the same concession to the shipper as its competitors, it will be placed at a disadvantage, that is, deprived of an opportunity to compete for the outbound traffic. This fact is emphasized by the testimony of appellants' witness Hall before the Examiner. We quote from page 41, Stenographers' Minutes Before The Interstate Commerce Commission, Docket No. 28590, a part of the record before the Court, but not printed:

"Q. (By Mr. Hawkins). Let's take the shipment of cottonseed, Mr. Hall, from New Albany, Mississippi, that comes into Columbus—(Over the Frisco)—I believe you testified that.

"A. That is right.

"Q. Now, assume that the tariff of respondent, I.C.C. No. 81, is cancelled. If that shipper elected to ship out over the C. & G. instead of over your line, wouldn't it cost him a premium?

"A. No.

"Q. He would not get a refund under your tariff, would he?

"A. He would be silly to ship out over the C. & G.

"Q. That doesn't answer the question, Mr. Hall.

"A. I think it does.

"Q. You said he would be silly to ship. Why should he be silly?

"A. Because he would lose money.

"Q. That is the question I asked. It would cost more to ship out over the C. & G. than it would over the Frisco?

"A. I am answering the question; you are asking them.

"Q. It would cost more to ship out over the C. & G.?

"A. Yes, it would cost more."

It is appellee's contention that the inbound carrier of the cottonseed to the mill point has no inherent or vested right to the outbound haul of the products manufactured from the seed.

We submit our position is sustained by this Court in *Atchison, T. & S. F. Railway Company v. United States*, 279 U. S. 768; 73 L. ed. 947. Speaking of the tie-up of outbound traffic by means of so-called transit tariffs, the Court said:

> "This convenient fiction is employed as a justification for the discrimination involved in giving rates lower than those ordinarily applicable to the service outbound. * * * * There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originates."

The appellee's cut-back tariff gives all shippers similarly situated the same concession, advantage or opportunity. It discriminates against none, nor is prejudicial to any. It only gives the shipper a freedom of choice of routes and the appellee the freedom of solicitation of freight and thereby voids the monopoly on this admittedly free traffic that appellant lines hold by means of their cut-back tariff.

Appellee, before using self-help to meet competition by filing its tariff in issue, I. C. C. No. 81, first endeavored, without success, to persuade the appellant carriers to cancel the cut-back practice—Stenographers' Minutes, pages 15-23, unprinted record. The only other alternative for the appellee, a short line that does not reach the primary markets of the cottonseed products, was to seek a system of proportional rates that would equalize the appellant carriers' cut-back rates. This would require a new and complex publication of rates to thousands of points throughout the United States and necessitate the concurrence of all connecting and intermediate carriers for its adoption. Even if such a plan could be effected, there was no assurance that the appellee's competitors in the case at bar would not increase their cut-back rates and thereby render futile its efforts to obtain equality of competition. We submit that the question is not whether some

other plan that would accomplish the same results and meet with the approval of the Commission, was available, but solely whether appellee's present tariff practice is lawful.

Division 3 of the Commission, in its report of May 3, I. & S. Docket No. 4599 (R. 56), which had under consideration an amendment to the tariff in issue, was apparently influenced by the failure of appellee's competing carriers to extend their cut-back arrangement to products of seed that moved to the mill point over appellee's line. We quote from the report:

> "Respondent's tariff I. C. C. No. 81 for the first time provided for cut-backs, even though the inbound movement was over another line. That tariff and its succeeding issue now under suspension are unique in this respect. Instead of placing itself on equal basis with its competitors, respondent's present effective (I. C. C. No. 81) and suspended tariffs place it in a more favorable position than any of them, since the tariffs of none of them go so far as to grant a refund to the shipper on traffic moving into the mill over the line of another carrier."

The fallacy of this reasoning is that there was nothing to prevent appellee's competitors from adopting the same practice.

The Commission, in that case, further held that:

> "If respondent's suspended issue could be found lawful, it would follow that similar tariffs published by the trunk lines serving the mill points would likewise be lawful. (We submit this observation is without legal significance). The result would be, if such action were taken, that the advantage gained by respondent from its tariff would be substantially offset by similar action of the competing lines, and all carriers would then transport outbound traffic at lower rates than those now lawfully in effect.

"The cut-back rates and tariffs of the trunk lines are not here in issue, and nothing in this report is to be construed as either approving or condemning them."

The appellee here, as in the prior case, seeks no advantage over its competitors, but it did not propose to remain inert and permit its competitors to secure undue advantage under their cut-back rates without attempting to adopt lawful means to meet such unfair competition. At the hearing, in case at bar, Stenographers' minutes, page 15, appellee offered to make no objections to the adoption by appellants or any connecting carrier of the same type of tariff, and stated, too, that it would join in an effort to eliminate the unfair provisions of the cut-back tariffs. Further, it has agreed of record, Stenographers' minutes, page 16, that it will likewise eliminate cut-back features from its own rates and establish the so-called cut-back rates as normal rate for the movement of cottonseed, provided the connecting carriers will adopt this policy. Thus we submit that any argument that the Columbus and Greenville, by its tariff in issue, is seeking an advantage or preference that will be lost by the filing of a similar tariff by its competitors loses its force.

In its Report in the case at bar Docket No. 28590, the Commission again refers to the appellants' tariff (R. 10), by stating: "The legality of interveners' tariff is not in issue."

The investigation of the appellee's tariff, resulting in the order for its cancellation, was upon the Commission's own motion. We submit it was inequitable to restrict the investigation to appellee's tariff and leave its competitors' tariffs in effect, to frustrate the appellee in its efforts to use self-help by lawful means, its tariff in issue, to meet a competitive situation.

The Commission points to no fact or makes no finding from which it may be concluded that the cut-back practice in appellee's tariff is unreasonable. The position of appellee in the instant case is analogous to that of appellee in: *United States of America, Interstate Commerce Commission, Illinois Central Railroad Company, et al v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al,* 294 U. S. 499; 79 L. ed. 1023.

The Milwaukee road sought to reduce its rates so as to place it on a parity with its competitors. The schedule was disapproved by the Commission, and the Milwaukee promptly commenced suit for an injunction. The carrier took the position: (1) That the order of the Commission was not supported by the findings; and (2) That, irrespective of the findings, it was not supported by the evidence. (The same is analogous to appellee's position here.) The District Court gave a decree for the complainant upon the second ground without passing upon the first. The Commission and intervening railroads appealed to the Supreme Court. We quote from the opinion affirming the decree:

> "This court has held that an order of the Interstate Commerce Commission is void unless supported by findings of the basic or quasi-jurisdictional facts conditioning its power. Florida v. United States, 282 U. S. 194, 215, 76 Le. ed. 291, 304, 51 S. Ct. 119; United States v. Baltimore & O. R. Co., 293 U. S. 454.
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> " 'In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit.' Florida v. United States, 282 U. S. 194, 75 L. ed. 291, 51 S. Ct. 119 supra. Orderly review requires that this objection being basic and jurisdictional, be disposed of at the beginning."

In the case at bar the Commission gives an extended narrative discourse upon the operation of appellee's tariff,

the tariffs of its competitors, the purpose for which the tariff was filed, the fact that same would not be needed but for the cut-back tariffs of its competitors, and the further fact that the tariff is only a means to equalize the rates applicable to the movement of cottonseed to mill points therein named, and the movement of the products manufactured therefrom to destinations over routes of appellee and its connecting lines, with the rates over the routes of appellant carriers, all of which is not disputed; then without in any wise pointing out wherein the practice is unjust or unreasonable, which is the only thing prohibited by section 1 (6) of the Act, the Commission declares same unlawful.

In the Milwaukee case, the Court further held:

"'A carrier is entitled to initiate rates and in this connection to adopt such policy of rate making as to it seems best.' * * * (Procedure of appellee in case at bar).

"Subject to these tests, the finding by the Commission that the new rates are unreasonable is seen to be nothing more than a deduction from the paragraph immediately preceding, wherein we learn that the schedule, if put into effect, will disrupt the rate structure in Indiana and related areas and disturb groupings and differentials maintained for many years. This brings us to the question whether such disruption and disturbance may be deemed a sufficient reason for taking from a carrier the privilege of reaching out for a larger share of the business of transportation and initiating its own schedule to help it in the struggle. * * * *

"Every change of a rate schedule, either voluntary or involuntary, is a disruption pro tanto of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change. * * * *

"We are warned by the new report, however, that a change once permitted has a tendency to spread. The acceptance of the new schedule for Milwaukee will lead, it is said, to requests for proportionate reductions by other lines in Indiana, and this in turn to new reductions by lines in Illinois and even in Kentucky, the outcome being characterized in the argument of counsel, though not in the report, as a rate war between the roads. The threat of such a war may be a reason for rejecting a new schedule if the rate relation previously existing is a fair one, or even, we may assume, if the Commission is without power to avert the reprisals and thereby nullify the threat. Neither of these conditions is satisfied in this case. The Commission does not hold that the existing rate relation is intrinsically sound and fair. On the contrary, it expressly concedes that the rate situation as between the Illinois and Indiana groups may be in need of correction, though it expresses the belief that this should not be done in any piecemeal fashion. The point of the decision is not that present rates are sound, but that they must be maintained, even if unsound, for fear of a rate war which might spread beyond control. The danger is illusory. * * * *

"In the light of these considerations it is not the Milwaukee that is subject to the reproach of dealing with the matter piecemeal. All that the Milwaukee has done is to initiate a schedule which must be upheld as lawful unless adequate reasons are presented for setting it aside. Cf. Anchor Coal Co. v. United States (D.C.) 25 F. (2d) 462; Atchison, T. & S. F. R. Co. v. United States, 279 U. S. 768, 773, 73 L. ed. 947, 950, 49 S. Ct. 494. The reproach of piecemeal action is incurred by the Commission, which has not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates, which has not questioned its own capacity to prevent unjust reprisals, which has

> put off to an indefinite future the remodeling of the rate structure for all the carriers affected, and which has left this particular carrier helpless in the interval. In brief a schedule of lowered tariffs has been canceled though the facts that control the validity of the reduction have yet to be determined. This was not a full discharge by the Commission of an immediate responsibility. It was inaction and postponement. Responsibility was shifted from the shoulders of the present to the shoulders of the days to come."

We submit that the rate relation existing in the instant case was unfair until appellee's tariff I.C.C. No. 81 was filed. It was so unfair that at the hearing appellants' own witness was moved to exclaim that a shipper "would be silly to ship out over the C. & G." if it was cancelled because "he would lose money." (Pg. 41, Stenographer's Minutes, supra).

We submit that the ruling of the Commission in the instant case is subject to the same criticism made by this Court in the Milwaukee case.

The appellant's argument that the appellee's tariff attempts to name rates on its connecting lines without their concurrence is not supported by the facts. The tariff does not even name rates, as that term is generally accepted, on appellee's own line, much less its connecting lines. It expressly stipulates in Item 5 (c):

> "The rates published in this tariff, must *not* be used in waybilling shipments. All shipments must be waybilled at full local or joint rates, lawfully applicable to manufacturing or mill point proper, in effect on date of shipment from point of origin."

The word rates in appellee's tariff, as in those of the appellant carriers, is used as a basis for allowance or refund, and this refund only becomes operative after a shipment of the cottonseed product has been made over the

carrier's line at full published tariff rates applying from the manufacturing or mill point. In no instances are the cut-back tariffs used by any of the carriers' agents in assessing transportation charges on the inbound seed or outbound product.

These cut-back tariffs are used by the carrier's freight claim agents for the purpose of computing refunds to shippers. They operate as many other transit privilege tariffs do in that their use is open to the public generally and applies to all shippers similarly situated. The refund allowance is solely at the expense of the carrier publishing the tariff. The fact of filing and publication removes any charge of unlawful rebate or refund of a published rate. See: *American Sugar Refining Co. v. Delaware, Etc. R. R. Co.*, 207 Fed. 733.

Section 6 (7) of the Interstate Commerce Act, relied upon by the Commission, does not prohibit refunds. It only prohibits the carrier from making a refund that is not specified in a tariff filed and published in accordance with the Act. We quote from the pertinent parts of Section 6 (7):

> "Nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified (in published tariffs), nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, *except such as are specified in such tariffs.*" (Italic ours).

The refund practice in appellee's tariff I.C.C. No. 81 is not condemned by section 6 (7), since it is lawfully filed and published with the Commission.

Appellee has never claimed that all refunds or practices are entitled to immunity from the Commission's scrutiny by merely being published in a tariff. But we do insist that the publication places the burden upon those

attacking the tariff provision to show that it unjustly discriminates so as to result in undue preference or disadvantage to persons or traffic similarly situated, or that it is otherwise unlawful. No such proof has been adduced in the case at bar. The decisions of this Court relied upon in the briefs of appellants, as we will point out later, confirm rather than oppose this view.

It is merely sophistry to argue that the appellants' tariffs are legal because they make the refund out of freight charges collected from the first leg of the journey, whereas appellee makes the refund out of freight charges collected from the last leg of the journey. We submit neither the Commission nor the Court is interested in the source from which the carrier obtains the money with which to satisfy its tariff practice so long as the rates are reasonable, there is uniformity of rates to the shippers, and the business is profitable to the carrier. There is no dispute as to the fulfilment of these conditions in the instant case.

Section 6 (4) is also referred to by the Commission to sustain its finding. This section provides:

> "The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties."

There is no joint tariff involved in this litigation, and this reference has no application to the facts at bar. Nor is appellants' argument improved by saying that the Commission has considered sections 6 (4) and 6 (7) together and has construed them as preventing a single carrier, party

to a joint tariff, from refunding any portion of a rate published in a joint tariff without the concurrence of the other participating carriers. Such construction finds no support in the plain language of the Act and is in conflict with the decision of the Supreme Court, in *Central Railroad Co. of New Jersey v. United States*, 257 U. S. 247, where the Court held that a carrier may provide for a transit privilege on its line by its individual tariff and without the concurrence of other carriers. We quote from the opinion, page 255:

> "Whether the privilege shall be granted or withheld is determined by local carrier. If granted, the local carrier determines the conditions; and these are set forth in the local tariff. Although a joint through route with joint rates is established by concurrent action of several carriers, the transit privilege may thus be granted by a carrier without the consent of, and without consulting, connecting carriers."

We submit the holding of the Supreme Court sets at rest the argument that appellee's tariff I. C. C. No. 81 to be valid must have the concurrence of its connecting carriers, appellants here. This tariff I.C.C. 81 publishes practices that match the practices of appellants' tariffs (R. 18-53) by equalizing the net rate to the shipper and giving all similarly situated a free choice of routes.

Since there is no issue of discrimination or unreasonable prejudice or unreasonable preference involved in this case, we will not attempt to go into the cases cited by appellant carriers in their brief, such as *Lehigh Valley Railroad Co. v. United States*, 243 U. S. 444, 61 L. ed. 839, and *Merchants Warehouse Company v. United States*, 283 U. S. 501, 75 L. ed. 1227. For these were cases involving departures from published tariffs and the making of refunds or payments not provided by any tariff. Here the appellee by its tariff accords the same concession to every

shipper. Every shipper receives equality of rates, and there is a competitive situation met by the tariff.

The observation of the Supreme Court, in reviewing a decree dismissing proceedings begun by the Interstate Commerce Commission against a Railway Company in *Interstate Commerce Commission v. Chicago Great Western Railway Company, et al*, 209 U. S. 108, 118; 52 L. ed. 705, 712, supports appellee's position in the instant case. There the Great Western Railway made a reduction in its rates, as testified to by its President, "for the purpose of securing a greater proportion of the traffic in the products of livestock than it had been previously able to obtain." The Court said:

> "It must be remembered that railroads are the private property of their owners; that while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager. As said in Interstate Commerce Commission v. Alabama Midland R. Co. 168 U. S. 144, 172, 42 L. ed. 414, 425, 18 Sup. Ct. Rep. 45, 51, quoting from the opinion in 5 Inters. Com. Rep. 697, 21 C. C. A. 59, 41 U. S. App. 466, 74 Fed. 723:
>
> " 'Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, — free to make special rates looking to the increase of their business, to classify their traffic, *to adjust and apportion their rates so as to meet the necessities of commerce and of their own situation and relation to it*, and generally to manage their important interests upon the same principles which are regarded as sound and adopted in other trades and pursuits.' "

ANSWER TO APPELLANTS' BRIEF

The appellant carriers' case is bottomed on this statement taken from their brief, pg. 26. "The fact is that the tariff purports to name rates on cottonseed from stations on other lines to mill points on the Columbus & Greenville which moves solely via the lines of such other carriers." We submit appellants' statement is without factual basis or legal significance. The seed moving to the mill point over appellants' line move under a bill of lading and waybill issued by appellant; the shipper pays the transportation charges to appellant upon arrival at destination according to the rates published in appellants' own tariff. The seed then becomes "free seed," *Atchison, Topeka & Santa Fe Railway Co., et al v. United States, et al,* 279 U. S. 768. Neither appellee's tariff I.C.C. 81 nor any of the appellants' tariff prescribing the "cut back" are used in waybilling or assessing the freight charges in the first instance. What are denominated rates are in fact the factors used in arriving at the net rate when the shipper subsequently ships the products manufactured from the seed. These factors, mile for mile, are exactly the same in all the tariffs whether appellee or appellant—C. & G. Tariff (R. 18), Frisco Tariff (R. 24), Illinois Central Tariff (R. 51). Again, we submit that without appellee's tariff the aggregate charges between competitive points for the movement of manufactured products over appellee's line from seed originating on appellants' line would be greater, resulting in discrimination against the shipper as to charges paid, restriction in choice of route, and prejudice to appellee in the loss of business for which it is entitled to compete.

In the brief of the learned counsel for the Commission, we find these very frank, and we submit controlling statements in regard to appellee's tariff:

> "The basis for computing the refund is such that when the appellee secures the outbound shipment of

products processed from seed brought inbound to the mill point by another railroad, the aggregate net amount payable by the shipper for the inbound and outbound movements is the same as if his traffic were handled both in and out of the mill point by the other railroad." Pg. 9.

"The Commission stated in substance that the purpose of the appellee in making the allowance was to enable it to compete for the outbound products thereof by meeting the allowances held out by such roads when originating the inbound shipment; that it was true, as urged by the appellee, that its tariff, offering such allowances, would not be necessary except for the tariffs of the other roads." Pg. 14.

The foregoing is a true statement of the reason for and purpose of appellee's tariff in issue and the practice expected by it. Any discussion which seeks to reinforce the untenable conclusion that the tariff operates to refund a part of another carrier's inbound rates on seed and absorbs the refund out of a joint outbound rate on the products simply produces "organized confusion" of the subject.

Again learned counsel says:

"The Commission's findings were not made in criticism of the end which the tariff was intended to accomplish, but were to the effect that the form and manner of the provision by which it was undertaken to accomplish the desired end did not conform to the requirements of the Act, etc." Pg. 17.

The plain language of appellee's tariff makes it crystal clear "The rates published in this tariff must not be used in waybilling shipments." (R. 14). Then how can it be said with any degree of accuracy, as asserted in page 26, Carrier's brief, that "The tariff purports to name rates on cottonseed from stations on other lines to mill points on

the Columbus & Greenville which moves solely via the lines of such other carriers"?

Appellant carriers submit "The title page of the tariff here in issue would indicate that it provides transit privileges, a matter of sole concern to the Columbus & Greenville." Page 26. Compare *Central Railroad of New Jersey, et al. vs. United States, et al*, 257 US 247. The tariff does exactly what appellants say its title indicates. It does not in any wise purport to name rates, or the division of rates with any other carrier. It is a transit privilege granted to the shipper, to permit his election of routes over which joint rates are in effect, the cost or burden of the privilege being upon appellee alone from its general revenues.

The tariff here in question does not purport to publish any through rate on cottonseed products but allows to the shipper certain privileges if he has complied with the conditions of the tariff.

Compare: *Central R. Co. of New Jersey v. U. S.*, 257 U. S. 247, 66 L. ed. 217.

We submit that there is no requirement of concurrence in the establishing of such privileges as the tariff here affords, in permitting the shipper liberty of choice and freedom to elect routes, where ultimate charges for transportation under the privilege are made uniform and equal. The tariff not being a joint one, the provision of Section 6 (4) of the Act requiring concurrence of parties, is not applicable.

We have examined the decisions of this Court cited in the brief of appellant carriers and the Commission. They are in no wise in conflict with the holding of the lower Court. In no instances have the appellants attempted to point out other than by general allegation any inconsistency.

We submit there is no issue of disputed fact in this case and the correctness of the Commission's findings there-

from. The sole question is the correctness of the legal principles adopted by the Commission as a basis for reaching a conclusion from its findings.

This proceeding was commenced by the Commission on its own initiative by authority of section 15 (1) of the Act, which empowers it after full hearing and finding that any individual or joint rate charged for transportation of property or persons or that any individual or joint practice, etc. of a carrier "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter" to prescribe just and reasonable rates and just, fair, and reasonable practices, etc. In not one line of its opinion or findings did the Commission say the practice prescribed in appellee's tariff was unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial. Counsel for appellant Commission points out in his brief "The end sought was not criticized by the Commission".

We submit the only remaining question is: Does the proviso "otherwise in violation of any of the provisions of this chapter" sustain the Commission's order? As Commissioner Splawn, in his vigorous dissent, pointed out (R. 12): "Nor does the report indicate wherein the provision in issue violates section 6 (1) and (4)". Section 6 (1) simply requires the filing with the Commission by the carriers of all schedules of rates, fares, charges, practices and allowances. It has never been asserted that appellee's tariff was not so filed or that it was ambiguous. As to section 6 (4), we have heretofore pointed out at length that the tariff in issue was not a joint tariff; and, therefore, no concurrence of connecting lines was necessary.

To hold the tariff practice invalid under section 1 (6) of the Act it must be found to be unjust and unreasonable, and no such findings were made.

The allowance or refund practice is published in tariff form and therefore conforms to section 6 (7). It has never been contended that the allowance was for transportation service performed by the shipper and permitted with limitations by section 15 (13) of the Act. This is a red herring dragged in by appeliant carriers.

Learned counsel for the Commission at page 36 of his brief cites the decision of this Court in *U. S. v. American S. & T. Plate Co.*, 301 U. S. 402, 81 L. ed. 1186, which condemned the allowances published in carrier's tariffs as sustaining appellants' position here. After an accurate synopsis of the case, counsel concludes "the allowances paid therefor constituted unlawful refunds in violation of section 6 (7) of the Act." The decision is based on no such conclusion.

The Commission in the investigation of the practices involved there found that the allowances permissible under section 15 (13), published in the respective tariffs for transportation services rendered by the shipper at the various plants under consideration, were in fact for no part of the service of transportation that the carriers were obligated to furnish under their line haul rates. Specifically "the industry performs no service beyond these points of interchange for which the carrier is compensated under its interstate line haul rates." We quote the pertinent part of the Court's decision:

> "These findings are an adjudication by the Commission that the spotting service within the appellee's plants is not transportation service which the carriers are bound to render in respect of receipt and delivery of freight. The statute contains this definition: The item 'transportation' shall include * * * all services in connection with the receipt, delivery, elevation and transfer in transit * * * of property transported. The Interstate Commerce Commission is authorized and required to enforce the provisions of the Act and,

> that after hearing it be of opinion that any regulation or practice of a carrier be *unjust* or *unreasonable* or *unjustly discriminatory* 'or otherwise in violation of the provisions of this Act', to determine what practice is or will be just, fair and reasonable to be thereafter followed and to make an order that the carrier cease and desist from violation to the extent that the Commission finds violation does or will exist. Section 15 (1)". (Italics ours).

The decision merely stands for the proposition that the publication of an allowance by virtue of section 6 (7) does not per se clothe the practice with immunity from the Commission's scrutiny in the performance of its various duties under the Act. The appellee has never controverted that position. We say insistently, however, that the opinion of the Court confirms appellee's claim that before the Commission can invalidate its tariff it must find the allowance or refund practice "unjust or unreasonable or unjustly discriminatory" which has not been done, nor will the facts in the instant case admit of such finding; or it must hold, supported by substantial evidence, that the practice is "otherwise in violation of the Act". As heretofore pointed out, the record will not sustain such a conclusion.

We have no quarrel with the many cases cited in the briefs of both carriers and the Commission to the effect that lodging a "forbidden discrimination" in a tariff does not clothe it with immunity. The answer is, that there is no "kinship" between them and the case at bar. Appellee's tariff operation as demonstrated by the record and the briefs of appellants, creates no discrimination, but on the other hand it insures equal rates to all shippers similarly circumstanced and equal opportunity between carriers to compete for the business.

At page 43 of the Commission's brief, Counsel makes this observation, quoting from the record:

> "Upon oral argument it was admitted that respondent had not undertaken the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute." (R. 11).

Counsel then comments further quoting:

> "In short the Commission's findings were not directed against the *end* which the appellee's tariff was intended to accomplish." (Italics ours).

With the results produced by appellee's tariff admittedly not subject to the Commission's "criticism" page 13, no question of the reasonableness of the practice is involved.

The opposing argument then rests on the suggestion that some other form of tariff be used such as "the establishment of through routes with joint rates or to accomplish the end desired by proportional rates through procedure authorized by the statute." The record reflects the existence of through routes with joint rates between appellants and appellee on all commodities involved. If the carriers had been willing for appellee to become a party to its cut-back tariffs, the issue would not now be before this Court. And as stated by the Commission: "If it were not for the cut-back rates of the connecting lines, there would be no necessity for respondent's (appellee) tariff * * *" (R. 9). Speaking of the suggestion, learned counsel for the Commission at page 23 of his brief wisely observes: "Doubtless these steps were neither direct nor certain as to results * * *." We submit the suggestion of the Commission is not only impractical but doomed to failure before undertaken since it is counter to the proviso in section 15 (3) of the Act that the Commission may not require any railroad to join in a through route that short hauls it.

We submit that the Commission admitting the "end" accomplished by appellee's tariff justifiable, shifted re-

sponsibility by its action "from the shoulders of the present to the shoulders of the days to come", and "left this particular carrier helpless in the interval", with the relief granted by the lower court a fitting corollary.

The case of *United States v. Pan-American Petroleum Co.*, 304 U. S. 156, cited at page 38 of the Commission's brief, involved questions foreign to the instant case. The Court held the contentions the same as those considered in *United States v. American S. & T. Plate Co.*, 301 U. S. 402, and foreclosed by the decision therein. We have heretofore distinguished that case from the one at bar. Suffice it to say, however, the Pan-American case involved allowances for terminal switching by various industries. There were many related and controverted facts from which the Commission reached its conclusion, and the Court observed that the value and weight of evidence and the inference to be drawn from it were for the Commission, and they were unable to say that "the Commission's orders were not based upon substantial evidence." We can see no analogy between that case and one here where there is no dispute in the evidence, the sole question being one of law.

The mechanics of appellee's tariff, its publication and the results produced when applied are not disputed. The standard used by the Commission to condemn it was solely to assert it violated certain provisions of the Transportation Act. A legal conclusion, we submit, unsupported by findings and properly reviewed and determined by the lower Court. Compare: *Florida v. United States*, 282 U. S. 193, 75 L. ed. 291.

The straw man raised in each of appellants' briefs is the false assumption that all refunds are forbidden and therefore appellee's tariff is the medium of an unlawful practice. It is not the refund that the Act, section 6 (7) forbids but secret departures from published tariffs.

We submit section 6 (7) remains a sanctuary for the published practice here involved unless a violation of some

other provision of the Act is established by substantial evidence; and we further submit that the lower Court was correct in holding that there was no such violation.

If the shield that protects these "cut-back" tariffs is truck competition it does not follow they can legally be turned into a sword to strike down competitive rail rates.

Appellants in their briefs repeatedly charge that their tariffs (R. 18 and 24) are not in issue (R. 65); and in their third assignment of error allege "the Court erred in holding that intervener's tariffs are very material to a correct solution of the validity of the plaintiff's tariff." All of which we submit is like contending that one charged with criminal assault has no right to interpose a plea of self defense.

We say again that in *Atchison, Topeka & Santa Fe Ry. Co. v. U. S., et al*, 279 U. S. 768, the right of the Columbus & Greenville to adopt and publish a tariff to remove the disability and discrimination to it and to the shipper is confirmed.

The decision in *Merchants Warehouse Co. v. U. S.*, 283 U. S. 501, 75 L. ed. 1227, and the opinion of Mr. Justice, now Chief Justice Stone, relied upon by appellant Commission is not contrary to the contention here made as to the lawfulness of the tariff in issue. In that case certain private contract warehouses at Philadelphia had been named by certain railroad companies as public freight stations, but they were not used as such, nor were all warehouses similarly situated given equal privileges with these particular warehouses.

The Court held that these private contract warehouses could not be compensated for services in transporting freight over certain railroad lines from freight charges, because all other similar warehouses were not treated uniformly. In other words, a carrier could not discriminate

between shippers under section 2 of the Act. The Court said:

> "Section 2 forbids the carrier to discriminate by way of allowances for transportation services given to one—which it denies to another in like situation."

The findings of the Commission, the decision of the lower Court, and the brief of the Commission do not challenge the fact that the refund practice effected through appellee's tariff is consonant with natural equity. At most, there is suggested another but dubious route to accomplish the desired end, overlooking the main objective of the Act, "to have but one rate open to all alike and from which there could be no departure," *Boston & M. R. R. Co. v. Hooker*, 233 U. S. 97, *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 265. The appellee's tariff does just that.

With deference, we submit that any further analysis of the cases relied upon by appellants to set aside the decision of the lower Court would needlessly prolong this brief.

CONCLUSION

We submit that the conclusion of the Commission holding the tariff unlawful bore no relation to the legislative policy to be enforced by the Commission as announced in the sections of the Act cited by it, and that the effect of the decision, as stated in the dissenting opinion of Commissioner Splawn, "violates all principles of justness and fairness as it precludes respondent from participating in the outbound movement or in the through movement of

the traffic from origins on an equality of rates with the trunk lines." (R. 12).

We respectfully submit that the judgment of the lower Court should be affirmed.

COLUMBUS AND GREENVILLE RAILWAY CO.,

By R. C. Stovall

R. C. Stovall, General Counsel,

Forrest B. Jackson

Forrest B. Jackson, Counsel.

Dated at Columbus, Miss.,
March 26, 1943.

CERTIFICATE

I hereby certify that I have this day mailed, postage prepaid, to each party of record, a true copy of this brief.

Dated at Jackson, Mississippi, this 26th day of March, 1943.

Forrest B. Jackson

Forrest B. Jackson,
Of Counsel for Appellee.